1999

Dee Blain v. Wal-Mart Stores, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DEE BLAIN,	:	
	:	
Plaintiff and Appellant,	:	
	:	
vs.	:	District Court No. 970400626PI
	:	
WAL-MART STORES, INC.,	:	Court of Appeals No. 990235-CA
	:	
Defendant and Appellee.	:	Priority No. 15

BRIEF OF APPELLEE

Appeal from the Order
Granting Defendant's Motion for Summary Judgment and
Order Denying Plaintiff's Motion for Relief of the
Fourth Judicial District Court of Utah County, State of Utah
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES

I.

ISSUES ON APPEAL

A. Whether the trial court correctly determined that Utah law requires Appellant to attach supportive evidence to her Memorandum in Opposition to Appellee's Motion for Summary Judgment.

B. Whether the trial court correctly determined that Appellant failed to produce sufficient evidence to make out a prima facie case of negligence against Appellee.

C. Whether the trial court abused its discretion in ruling that Appellant's failure to attach supporting evidence to her Motion in Opposition to Summary Judgment is not the type of mistake or inadvertence that merits relief under Rule 60(b) of the Utah Rules of Civil Procedure.

II.

STANDARD OF REVIEW

In reviewing a Motion for Summary Judgment, an appellate court accords no deference to a trial court's legal conclusions but examines them for correctness. Butterfield v. Okubo, 831 P.2d 97 (Utah 1992); Schurtz v. BMW of North Am., Inc., 814 P.2d 1108 (Utah 1991).

In considering a Motion for Relief based on Rule 60(b) of the Utah Rules of Civil Procedure, the Utah Supreme Court has held that the trial court has wide discretion in determining whether a party has demonstrated "mistake, inadvertence, surprise, or excusable neglect." Larsen v. Collins,

684 P.2d 52, 54 (Utah 1984). The trial court's ruling denying a rule 60(b) motion will not be reversed unless there has been an abuse of discretion. Id.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Rule 60(b) of the Utah Rules of Civil Procedure. Rule 60(b) is attached in the Addendum as Exhibit "A."

Rule 56(c) of the Utah Rules of Civil Procedure. Rule 56(c) is attached in the Addendum as Exhibit "B."

Rule 56(e) of the Utah Rules of Civil Procedure. Rule 56(e) is attached in the Addendum as Exhibit "B."

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

This case arose from an injury allegedly sustained as the result of a slip and fall of Plaintiff and Appellant, Dee Blain ("Blain"), in a retail store operated by Defendant and Appellee, Wal-Mart Stores, Inc. ("Wal-Mart")

on September 25, 1995. (Complaint at 1; R. 4). The subject grocery store is located in Utah County, State of Utah (Id.).

II.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

On or about August 8, 1997, Blain filed her Complaint in the Fourth Judicial District Court, Civil No. 970400626 PI. (Complaint at 4; R. 4). On or about September 5, 1997, Wal-Mart filed its Answer to Blain's Complaint. (Answer at 4; R. 15). On or about December 10, 1998, Wal-Mart filed its Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment. (Defendant's Motion for Summary Judgment at 2; R. 66; Defendant's Memorandum in Support of Motion for Summary Judgment at 12; R. 103). On or about January 11, 1999, Blain filed her Response to Defendant's Motion for Summary Judgment and on about February 9, 1999, Wal-Mart filed its Reply Memorandum. (Plaintiff's Response to Defendant's Motion for Summary Judgment at 9, R. 113; Defendant's Reply Memorandum at 16, R. 167). The trial court granted Wal-Mart's Motion for Summary Judgment on February 9, 1999.

(Memorandum Decision Order granting Defendant's Motion for Summary Judgment at 3, attached in Addendum as Exhibit "C"; R. 177).

On or about March 9, 1999, pursuant to Utah R. Civ. P. 60(b), Blain filed a Motion for Relief from Order and a Memorandum in Support of Motion. (Motion for Relief from Order at 1; R. 179; Memorandum in Support of Plaintiff's Motion for Relief from Order at 8; R. 187). Wal-Mart filed a Memorandum in Opposition to Plaintiff's Rule 60(b) Motion for Relief from Order on March 17, 1999. (Memorandum in Opposition to Plaintiff's Rule 60(b) Motion for Relief from Order at 13; R. 210). On March 24, 1999, the trial court issued its ruling denying Blain's motion. (Ruling at 1; R. 211). The next day, the trial court received Blain's timely Reply Memorandum to Wal-Mart's Memorandum in Opposition to Blain's 60(b) motion. (Reply Memorandum at 5; R. 245). After considering Blain's Reply Memorandum, the trial court found no reason to change its March 4 ruling and again denied Blain's Rule 60(b) Motion for Relief. (Ruling at 1; R. 248).

On March 5, 1999, Blain filed a Notice of Appeal to the Utah Supreme Court, appealing the Order granting Wal-Mart's summary judgment. (Notice of Appeal at 1; R. 189). On or about May 26, 1999, Blain filed a second Notice of Appeal, this time appealing the trial court's denial of Blain's Rule 60(b) Motion for Relief. (Notice of Appeal at 2; R. 260).

On or about July 6, 1999, Blain filed a Motion for Summary Disposition with the Utah Supreme Court asking that the Utah Supreme Court reverse the District Court decision on the basis that the trial court committed manifest error in making the decision. (Motion for Summary Disposition; Appellant's Memorandum of Points and Authorities in Support of Her Motion for Summary Reversal). Wal-Mart subsequently filed a Memorandum in Opposition and Blain filed a Reply Memorandum. (Appellee Wal-Mart Stores' Memorandum in Opposition to Appellant's Motion for Summary Disposition; Appellant Dee Blain's Reply Memorandum to Appellee Wal-Mart Stores' Responsive Memorandum to Appellant's Motion for Summary Disposition).

This Court subsequently issued an Order denying and deferring Blain's motion for summary disposition. (Order dated August 26, 1999). Finally, this Court issued an Order consolidating Case No. 990235-CA and Case No. 990558-CA into the current Case No. 990235-CA. (Order of Consolidation at 1; R. 272).

STATEMENT OF FACTS

1. This case arose as the result of a slip and fall that allegedly occurred on September 25, 1995, in the Wal-Mart store in Orem, Utah. (Complaint at 1; R. 4).

2. At the time of the occurrence, Blain was accompanied by her daughter, Sheri Anderson. (Id.). Blain and her daughter had completed their shopping and were walking toward the cashier stands to pay for their purchases. (Deposition of Dee Blain at 11; R. 88). As the two shopping companions were walking, Blain alleges that she slipped in detergent that had been spilled on the floor of the Wal-Mart store. (Id. at 22; R. 82).

3. Blain's daughter testified that they did not know how long the substance had been on the floor, or where it came from, or whether any

Wal-Mart employee was aware of the spill prior to Blain's fall. (Deposition of Sheri L. Anderson at 31; R. 79).

4. Blain testified that she was stunned by the fall and that she remained on the floor after the fall for about 10 to 15 minutes. (Deposition of Dee Blain at 15 - 17; R. 83 - 85).

5. Melia Lei O'Hawaii White Freeman was employed at Wal-Mart as a department manager in the fabrics section on the day of Blain's fall. (Deposition of Melia Freeman at 8; R. 75).

6. On the day of Blain's fall, Ms. Freeman was working in one of the aisles when she noticed a couple of small wet spots on the floor. (Id. at 33; R. 74). She then retrieved some paper towels and began wiping up what she saw. (Id.).

7. As Ms. Freeman wiped the spots from the floor, she noticed another spot. (Id. at 33 - 34 and 36 - 37; R. 73 - 74 and 70 - 71). As she wiped the second spot, she noticed a third. (Id.). This became a pattern as she cleaned up the spill. (Id.).

8. Ms. Freeman followed the spots around a corner and came upon Blain. (Id. at 35 - 38; R. 69 - 72). When Ms. Freeman arrived where Blain was located, Blain was standing and speaking with Troy Guevara, the assistant store manager. (Id.).

9. It only took one or two minutes after Ms. Freeman discovered the spill to clean it all the way to where she found Blain and Mr. Guevara. (Id. at 51 - 52; R. 67 - 68).

10. On December 12, 1998, Wal-Mart filed a Motion for Summary Judgment and accompanying Memorandum in Support of Motion for Summary Judgment. (Defendant Wal-Mart Stores' Motion for Summary Judgment, R. 66; Defendant's Memorandum in Support of Motion for Summary Judgment, R. 103).

11. On January 8, 1999, Blain filed a Memorandum in Opposition to Wal-Mart's Motion. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment; R. 113). Among the many other arguments Blain made in her Memorandum, she argued that, although Melia Freeman had seen a customer talking to the store manager after she

walked to the front of the store, the person Ms. Freeman saw was not Blain. (Id. at 7; R. 107).

12. Blain offered no affidavits, interrogatories or deposition testimony supportive of her arguments. (Id.).

13. On February 9, 1999, the Court filed a Memorandum Decision and Order granting Wal-Mart's Motion for Summary Judgment because Blain failed to prove that Wal-Mart had actual or constructive knowledge of the spill prior to Blain's fall, or that Wal-Mart had adequate opportunity to clean the spill after Blain's fall. (Memorandum Decision and Order at 2 - 3, Exhibit "C"; R. 175 - 76).

14. Because of Blain's failure to provide any evidence supportive of her assertions, the Court was unable to consider her arguments that Freeman was not talking to Blain when she walked to the front of the store. (Id.).

15. On February 25, 1999, Blain filed with the District Court a Motion for Relief from the Court's Memorandum Decision and Order under Rule 60(b) of the Utah Rules of Civil Procedure. (Motion for Relief

from Order; R. 179). Wal-Mart filed a Memorandum in Opposition and Plaintiff filed a Reply Memorandum. (Defendant Wal-Mart Stores' Memorandum in Opposition to Plaintiff's Rule 60(b) Motion for Relief from Order, R. 210; Plaintiff's Reply Memorandum to Defendant's Memorandum in Opposition to Plaintiff's Rule 60 Motion; R. 245).

16. On March 22, 1999, the Court issued a Ruling denying Plaintiff's Motion for Relief from Order. (Ruling at 1; R. 211). The Court found in the Ruling "that Plaintiff's failure to provide any supporting affidavit, deposition, or other evidence in opposition to Defendant's supported Motion for Summary Judgment does not constitute grounds for Rule 60(b) relief." (Id.).

17. Blain subsequently filed a Notice of Appeal relating to the District Court's denial of Blain's Rule 60 Motion for Relief and the Court's decision granting Wal-Mart's Motion for Summary Judgment. (Notice of Appeal, R. 189; Notice of Appeal, R. 260).

SUMMARY OF THE ARGUMENT

I. Rule 56 of the Utah Rules of Civil Procedure and judicial opinions interpreting the rule provide that a party has an affirmative duty to accompany a memorandum in support or opposition to a motion for summary judgment with evidentiary material. Public policy also favors attachment of evidence to preclude a party from relying on misstatements of testimony or even fabricated testimony. In contravention of these legal principles, Blain failed to attach any evidence to support her arguments in opposition to Wal-Mart's Motion for Summary Judgment. Furthermore, Blain's arguments are based on mere conjecture and speculation. Thus, the trial court was correct in dismissing Blain's Complaint.

II. Blain erroneously argues that any misidentification by Melia Freeman of Blain creates an issue of fact on whether Wal-Mart had notice of the condition causing Plaintiff's fall. The record shows that this argument is nothing more than conjecture and would not have made a difference in the Court's Ruling even if the applicable deposition pages

would have been attached to Blain's Memorandum in Opposition to Wal-Mart's Motion for Summary Judgment.

The clear evidence in the record demonstrates that Wal-Mart manager Troy Guevara discovered Blain after she fell, that Wal-Mart employee Ms. Freeman cleaned up the spill as soon as she noticed it, and that directly after cleaning the spill, Ms. Freeman came upon Blain and Mr. Guevera. The trial court accurately gleaned from the depositions on record that Wal-Mart did not have knowledge of the spill until after Blain's fall and had no opportunity to clean the spill. As a result, the lower court correctly concluded that the evidence failed to show that Wal-Mart had notice of the condition or a reasonable opportunity to remedy the condition.

III. The trial court properly granted Wal-Mart's Motion for Summary Judgment under the legal standards that apply to slip and fall cases. The Utah appellate courts have not wavered from holding that to make out a prima facie case of negligence against a business owner for an injury caused by a temporary condition, a plaintiff must produce sufficient evidence showing that defendant had 1) actual or constructive notice of the

condition, and 2) a reasonable opportunity to remedy the condition after having notice.

In the instant case, the record is devoid of any evidence that Wal-Mart had actual or constructive notice of the spilled detergent before Blain fell. The record shows that Wal-Mart only noticed the spill after Blain's fall and immediately wiped it up. Blain's arguments to the contrary are nothing more than bare allegations unsupported by evidence in the record Thus, Blain failed to make out a prima facie case of negligence against Wal-Mart, and the trial court properly dismissed her Complaint.

IV. Rule 60(b) of the Utah Rules of Civil Procedure provides relief from judgment under certain circumstances, including "mistake, inadvertence, surprise, or excusable neglect." Blain argued that her failure to attach evidence supporting the arguments in her Memorandum opposing summary judgment constituted mistake, inadvertence, surprise, or excusable neglect.

However, rather than offering a valid excuse for her omission, Blain argued repeatedly in her Relief Memorandum that she thought the rule did

not require her to attach deposition testimony. In direct contrast to Blain's argument, Rule 56 of the Utah Rules of Civil Procedure requires such attachment. Misunderstanding or misreading the law is not "mistake, inadvertence, surprise or excusable neglect" warranting reconsideration. The trial judge did not abuse its discretion in denying Blain's Motion for Relief and the lower court should not be reversed.

ARGUMENT

I.

UTAH LAW PLACES AN AFFIRMATIVE DUTY ON A RESPONDING PARTY TO ATTACH SUPPORTIVE EVIDENCE TO ITS MEMORANDUM IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT.

Blain argues in her Brief that the law in Utah does not require her to attach or file supportive deposition testimony, affidavits, interrogatories or other evidence to her memorandum opposing a motion for summary judgment and that mere citations to page numbers in depositions are sufficient. Brief of Plaintiff/Appellant at 15 - 20. Contrary to Plaintiff's arguments, Rule 56 of the Utah Rules of Civil Procedure and case law

interpreting the rule provide that deposition testimony must be filed with the memoranda.

Rule 56 of the Utah Rules of Civil Procedure provides in part:

> (c) *Motions and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, *depositions*, answers to interrogatories, and admissions *on file*, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> * * *
>
> (e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

UTAH R. CIV. P. 56(c) and (e) (emphasis added). Rule 4-501(1)(B) of the Utah Code of Judicial Administration further provides that a party opposing a motion shall file a memorandum in opposition along with all supporting documentation. Utah Code of Judicial Administration R. 4-501(1)(B).

The Utah Supreme Court has reiterated and clarified these provisions, holding repeatedly that a party opposing a summary judgment motion has an affirmative duty to provide evidentiary support for the assertions they make. In a 1994 Utah Supreme Court case, Thayne v. Beneficial Utah, Inc., 874 P.2d 120 (Utah 1994), the defendant filed a motion for summary judgment. Plaintiff filed an opposing memorandum but failed to attach any affidavits or evidentiary support for his memorandum. Id. at 123. The court granted defendant's motion in large part because "Thayne, as the party opposing Beneficial's properly supported motion, had an affirmative duty to respond with affidavits or other materials allowed by rule 56(e)." Id. at 124 (citations omitted).

The case of Franklin Financial v. New Empire Development Company, 659 P.2d 1040 (Utah 1983), was cited by the District Court in its

Memorandum Decision. The Utah Supreme Court in Franklin likewise held that the party opposing a summary judgment motion has a duty to attach supportive evidence. The Utah Supreme Court stated as follows in the Franklin opinion:

> [W]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment.

Franklin, 659 P.2d at 1044; See also Cowen and Co. v. Atlas Stock Transfer Co., 695 P.2d 109, 114 (Utah 1984); Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217, 1219 - 20 (Utah 1987).

Public policy also favors Wal-Mart's position on this issue. Should Blain's argument be accepted, an unscrupulous party could file a motion for summary judgment, or memorandum in opposition to such a motion, based entirely on misstatements of testimony or even fabricated testimony. A court simply could not distinguish between legitimate arguments and unsubstantiated contentions. To accept Blain's position would completely

defeat the purpose behind Rule 56 which requires a party to offer evidentiary support for its allegations in a memorandum.

Blain argues in the alternative that if she was required to attach supportive depositions, the trial court decision was in error because Wal-Mart attached the relevant sections of the deposition transcripts to its Memorandum in Support of Motion for Summary Judgment. Brief of Plaintiff/Appellant at 25 - 33. Plaintiff therefore argues that the Court had the evidence to consider. Id.

Contrary to Blain's representations, Wal-Mart did not attach all of the portions of Blain's and Freeman's deposition transcripts that support Blain's misidentification argument. For example, in making the misidentification argument, Blain cited to pages 39, 41, 44 - 45 and 56 - 57 of Freeman's deposition transcript. Plaintiff's Memorandum in Opposition, Statement of Facts ¶¶ 14 - 16; R. 109 - 10. She further cited to page 19 of her own deposition transcript. Id. ¶ 11; R. 110. In its Memorandum in Support of Motion for Summary Judgment, Wal-Mart did not attach pages 39, or 56 - 57 of Freeman's transcript or page 19 of Plaintiff's deposition transcript.

Defendant Wal-Mart Stores' Memorandum in Support of Motion for Summary Judgment, Exhibits "A" and "C"; R. 67 - 76 and 82 - 90; Defendant Wal-Mart Stores' Memorandum in Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, Exhibits "B" and "D"; R. 117-30 and 137 - 40. Not only did Wal-Mart not attach the evidence to support Blain on this issue, Blain also did not attach the evidence. As a result, the court correctly ruled that it had no supporting factual basis to consider Blain's arguments. Memorandum Decision at 2 - 3, Exhibit "C"; R. 175 - 76.

Blain simply cannot expect the Court to evaluate her arguments without support in the record for review. The deposition transcripts are not on file. If the party opposing a motion does not attach or otherwise file the evidence, the Court does not have an opportunity to review the evidence, and it is unfair to expect the Court to take Blain's "word for it."

Both the governing law and public policy support the trial Court's decision to hold Blain to the attachment rule. Blain's arguments to the contrary should be declined and the trial court's ruling affirmed.

II.

THE TRIAL COURT CORRECTLY GRANTED WAL-MART'S SUMMARY JUDGMENT BECAUSE THERE IS NO EVIDENCE THAT WAL-MART HAD NOTICE OF THE SPILL BEFORE THE OCCURRENCE.

Blain indicates in her Brief that the District Court acted "in haste" and did not consider Blain's factual arguments in granting Wal-Mart's Motion for Summary Judgment in Wal-Mart's favor. Brief of Plaintiff/Appellant at 35 - 36. To the contrary, a conscientious reading of the District Court's Memorandum Decision demonstrates that the Court carefully considered every supported claim. Memorandum Decision at 1 - 3, Exhibit "C"; R. 175 - 77. The only argument the Court specifically said it could not evaluate was the argument that Melia Freeman misidentified the customer at the end of the spill as Blain. Id. at 2, Exhibit "C"; R. 176.

The Memorandum Decision shows that the judge considered the factual arguments supported by the attached materials and concluded that "there is no evidence that Defendant had knowledge of the liquid detergent spill until after Plaintiff's injury", and that there was "also no evidence that

the spill had existed for a long enough time that Defendant had constructive knowledge of it." Id.

In this appeal, Blain makes much of the argument that Ms. Freeman, the Wal-Mart employee who discovered and immediately cleaned up the spill, misidentified the customer at the end of the spill as Dee Blain. Plaintiff's Memorandum in Opposition at 7; R. 107. Blain speculates that because the description given by Freeman does not match her own, Blain's fall could have occurred *after* the described meeting took place. Plaintiff's Memorandum in Opposition at 7; R. 107. As mentioned above, this is only one of several arguments Blain raised in her Memorandum in Opposition to Wal-Mart's Motion for Summary Judgment. Id. at 5 - 9; R. 105 - 09. The record of the case shows that the argument is nothing but conjecture and would not have made a difference in the Court's ruling even if the deposition pages were attached to the Memorandum.

Contrary to Blain's arguments, the evidence of the case does not support Plaintiff's position that Blain's fall could have occurred after the meeting. The clear and substantiated evidence in the record shows that (a)

Troy Guevara discovered Ms. Blain after she fell, (b) that a female employee from the fabrics department arrived at the scene after Plaintiff's fall and told Guevara that she had cleaned up the spill and that the spill started back in fabrics, (c) that Melia Freeman was that employee, (d) that when Ms. Freeman arrived at the scene, no one, including Blain, was lying on the floor, and (e) when Freeman left the scene, the spill had been completely cleaned up. Defendant Wal-Mart Stores' Memorandum in Support of Motion for Summary Judgment at 2 - 4, R. 100 - 102; Defendant Wal-Mart Stores' Memorandum in Reply to Plaintiff's Memorandum in Opposition to Summary Judgment at 2 - 5 and 11 - 14, R. 163 - 166 and 154 - 157; Deposition of Melia Freeman at 8, 24, 33 - 40, 43 - 45, 51 - 52 and 59 - 60; R. 69 - 75, 118 - 124 and 129; Deposition of Dee Blain at 6, 11 - 17 and 22; R. 82 - 89; Deposition of Troy Guevara at 48 - 49, 54 - 55; R. 144 - 147.

The identity of any other woman speaking with Troy Guevara at that time is irrelevant. The relevant issue is that by the sworn testimony of Troy Guevara and Melia Freeman, the meeting/conversation between Guevara

and Freeman occurred after Blain's fall. Id. Blain offered *no* evidentiary support that the meeting/conversation between Guevera and Freeman took place before she fell. In fact, all sworn testimony in the case is to the contrary.

Blain's argument that Wal-Mart may have knowledge of the spill before the fall because Freeman's description of Blain was inaccurate is based entirely on speculation. Blain is requesting the jury to draw an unreasonable inference that is not supported by the record. In deciding whether a plaintiff's complaint can survive a motion for summary judgment, the plaintiff is entitled to all "reasonable" or "fair" inferences which tend to prove his or her case. Allen v. Federated Dairy Farms, Inc., 538 P.2d 175 (Utah 1975); Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994). A plaintiff is not entitled to inferences based on conjecture that are not supported by evidence in the record. Webster v. Sill, 675 P.2d 1170 (Utah 1983). A jury is not permitted to speculate that the defendant is negligent. Id.; Lindsay v. Eccles Hotel Co., 284 P.2d 477 (Utah 1955); Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985).

In her Appeal Brief, Blain sets forth a list of other inferences the jury could supposedly make to find that Wal-Mart had knowledge of the substance on the floor before Blain's fall. Brief of Plaintiff/Appellant at 30 - 33. These supposed inferences are not "reasonable" or "fair" inferences but bare allegations unsubstantiated by evidence in the record. An example is Blain's argument that a jury could infer that Freeman avoided aspects of her job, such as looking for safety hazards, because she admitted to sometimes removing her smock to avoid interacting with customers. Id. at 31 - 32. This argument is an unreasonable and unfounded stretch of the evidence. Furthermore, Blain takes the testimony out of context. A review of the transcript shows that Freeman testified she sometimes takes off her smock so that she can quickly and efficiently, without customer distraction, clean the floor in the event of a spill. Deposition of Melia Freeman at 60; R. 118. This testimony is supportive of Wal-Mart's position, and it in no way advances Blain's case.

There is absolutely no evidence that Melia Freeman avoided looking for safety hazards, or avoided promptly cleaning up the spill that caused

Plaintiff's fall, merely because she may have removed her Wal-Mart smock. To the contrary, the evidence shows that Freeman was diligent in cleaning the spilled substance on the day of the occurrence, and, that if she happened to remove her smock, it was so that she could focus on cleaning the spill. Deposition of Melia Freeman at 33 - 38 and 60; R. 69 - 74 and 118.

It is also important to note that Blain raises the "smock argument" for the first time on appeal. The argument was not raised in the trial court and therefore cannot be considered on appeal. Certified Sur. Group, Ltd. v. UT Inc., U.T.I., Inc., 960 P.2d 904, 906 n.3 (Utah 1998); Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996).

Contrary to Blain's arguments, the trial court carefully reviewed the factual evidence of this case and concluded Wal-Mart could not have known of the spill prior to Blain's fall and it had no opportunity to clean the spill prior to Blain's fall. Memorandum Decision at 1 - 3, Exhibit "C"; R. 175 - 77. Even when considering the facts in a light most favorable to Blain, the record reveals no genuine issue of material fact. The trial court ruled

appropriately in granting Defendant's Motion and Blain's conjecture and speculation do not justify a reversal of that ruling.

III.

THE TRIAL COURT PROPERLY GRANTED WAL-MART'S SUMMARY JUDGMENT UNDER THE LEGAL STANDARDS GOVERNING SLIP AND FALL CASES.

In advancing the arguments of liability against Wal-Mart, Blain seems to ignore the governing legal standards that are required to be met by an injured party to make out a prima facie case of negligence against a defendant store owner. The law in Utah provides that "'[t]he owner of a business is not a guarantor that his business invitees will not slip and fall. He is charged with the duty to use reasonable care to maintain the floor of his establishment in a reasonably safe condition for his patrons.'" Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996) (quoting Preston v. Lamb, 436 P.2d 1021, 1023 (Utah 1968); citing Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140 (Utah 1977) ("property owners are not insurers of the safety of those who come upon their property even though they are business invitees.")).

The most recent and all-encompassing case addressing slip and fall law is Schnuphase v. Storehouse Markets, 918 P.2d 476 (Utah 1996). In Schnuphase, the Supreme Court of Utah determined that slip-and-fall cases fall within two general "classes" of cases. The first class of cases "'involves some unsafe condition of a *temporary* nature, such as a slippery substance on the floor . . . .'" Id. at 478 (quoting Allen, 538 P.2d at 176). The second class of cases "'involves some unsafe condition of a *permanent* nature, such as: in the structure of the building, or of a stairway, etc. or in equipment or machinery, or in the manner of use, which was created or chosen by the defendant . . . .'" Id.

With respect to the first class of cases, the Schnuphase Court explicitly outlined the minimum level of proof necessary to sustain a prima facie case:

> In this class of cases it is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such

knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it.

Id. at 478.

The injured plaintiff has the burden of presenting evidence showing that the above prerequisites are satisfied in order to make out a prima facie case of negligence against the defendant. Id. This showing cannot be made by unsupported assertions or erroneous inferences. Rather, there must be substantial evidence in the record to support a verdict for plaintiff. Koer v. Mayfair Markets, 431 P.2d 566, 568 (Utah 1967). Utah appellate courts have upheld a trial courts' granting of summary judgment motions and motions for directed verdicts on numerous occasions where plaintiff fails to produce adequate evidence proving notice and a reasonable opportunity to remedy. Id.; Lindsay, 284 P.2d 477; Mayfair Markets, 431 P.2d 566; Howard v. Auerbach Co., 437 P.2d 895 (Utah 1968); Long v. Smith Food King Store, 531 P.2d 360 (Utah 1973); Allen, 538 P.2d 175; Martin, 565 P.2d 1139.

The case at bar involves a temporary hazard, "a slippery substance on the floor"; precisely the type of case the Utah Supreme Court determined

would be governed by the first class of cases. Therefore, the standards applicable to the first class of cases are controlling here. In other words, Blain must establish the "notice requirements" to advance her case against Wal-Mart.

Here, the record is devoid of any evidence that Wal-Mart had notice, actual or constructive, of the spilled soap before Blain's fall. The trial court in its Memorandum Decision held that

> Ms. Freeman had been cleaning the spill for one to two minutes when she discovered Plaintiff standing and talking to assistant manager Guevera after the injury. Plaintiff testified in her deposition that she remained on the floor for ten to fifteen minutes after the fall. Since Plaintiff was standing when Ms. Freeman found her talking to Mr. Guevera, Defendant did not have knowledge of the spill until several minutes after the fall.

Memorandum Decision at 2; R. 176.

As the trial court held, Blain failed to satisfy the two-part test outlined in Schnuphase. The evidence shows that Ms. Freeman had actual notice of the liquid detergent spill only after Blain's fall, and Freeman immediately wiped up the spilled soap after discovering the spill. The arguments raised by Plaintiff to the contrary are nothing more than bare allegations

unsupported by facts in the record. Dwiggins v. Morgan Jewelers, 811 P.2d 182, 183 (Utah 1991). A review of the actual evidence in the record shows that there is no genuine issue of material fact and the trial court properly granted Wal-Mart's motion for summary judgment. Blain's speculation to the contrary is insufficient to withstand Wal-Mart's Motion for Summary Judgment.

IV.

BLAIN'S FAILURE TO ATTACH SUPPORTING EVIDENCE DOES NOT CONSTITUTE GROUNDS MERITING RELIEF UNDER RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 60(b) provides that relief from judgment may be had under certain circumstances:

> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trail under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied,

> released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

UTAH R. CIV. P. 60(b).

In the case at bar, Blain filed her Rule 60(b) Motion for Relief based on subsection (b)(1), arguing that her failure to submit the deposition testimony to the Court for consideration was "mistake, inadvertence, surprise or excusable neglect . . . ." Plaintiff's Memorandum in Support of Her Motion for Relief from Order at 5 - 7, R. 181 - 183. However, in advancing her Motion for Relief, Blain made no excuse for her failure to provide the evidence to support her opposition to summary judgment. Id. Indeed, she argued repeatedly that the rule does not require such action. Id.

Blain had the opportunity to offer the information that would support her opposition to summary judgment. Her only excuse for not providing the court with the supportive testimony is that, according to her reading of the law, it was not necessary. Id. She made no indication that the omission

was due to clerical error or some other reason. The omission, according to Blain, was that she did not believe attaching the deposition testimony to her Memorandum in Opposition to Summary Judgment was required by the rules. Id.

Blain's failure to fully research the applicable rules and case law is not "mistake, inadvertence, surprise or excusable neglect" and neither is her interpretation of that law. If failure to adequately research legal authority is an excuse warranting relief from judgment, countless rules and statutes would be completely undermined. Such is not a valid excuse warranting reconsideration of a decision.

In denying Blain's Rule 60(b) Motion, the trial Court found that Blain's failure to provide depositions and other evidence did not constitute grounds for Rule 60(b) Relief. Ruling dated March 22, 1999 at 1, R. 211. The Court was well within its discretion in making this Ruling. Larsen v. Collins, 684 P.2d 52, 54 (Utah 1984)(holding that trial court's ruling will only be reversed when there has been an abuse of discretion).

In arguing that the trial court abused its discretion, Blain cites the federal case of Blois v. Friday, 612 F.2d 938 (5th Cir. 1980). The Fifth Circuit Court of Appeals held in Blois that the trial court abused its discretion in denying plaintiff relief from summary judgment. In Blois, the trial court granted summary judgment to defendant because plaintiff's attorney failed to timely respond to defendant's motion for summary judgment. The reason plaintiff's attorney did not oppose defendant's summary judgment motion was because the attorney neglected to notice the district court of his new address and consequently did not receive defendant's summary judgment motion until the time to respond had passed.

It is understandable that a court would grant relief for this type of mistake. The lawyer in Blois had no idea that a summary judgment motion was pending. A party's not knowing that a motion has been filed is a world apart from receiving notice of summary judgment, opposing the summary judgment, and then offering no evidence to support one's contentions.

Blain further claims that the court committed error by raising the question of attachment *sua sponte*. Brief of Plaintiff/Appellant at 14 and 35

- 36. Contrary to Blain's assertion that the court voluntarily raised the issue, Wal-Mart, in its Reply Memorandum to Blain's Memorandum Opposing Summary Judgment, specifically called the court's attention to the fact that Blain predicated her misidentification argument "wholly on speculation" and failed to offer "specific facts". Defendant Wal Mart Stores' Memorandum in Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment at 13 - 14; R. 154 - 155.

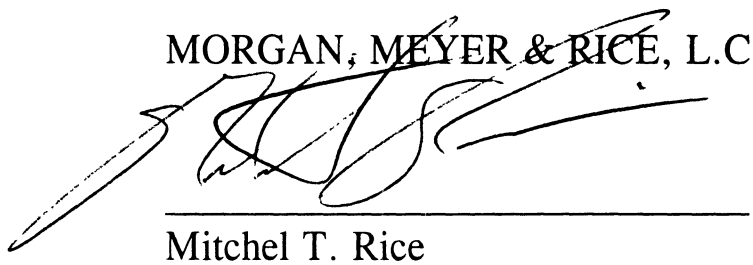
Secondly, because the purpose of summary judgment is to bar from the court "unjustified" litigation, one of the court's very roles is to *sua sponte* raise such an issue. Reliable Furn Co. v. Fidelity & Guar. Ins. Underwriters, 398 P.2d 685 (Utah 1965). Finally, when the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989).

CONCLUSION

Based on the foregoing, Defendant and Appellee, Wal-Mart Stores, Inc., respectfully requests that the Order of the trial court granting Wal-Mart Stores' Motion for Summary Judgment be affirmed, that the Order of the trial court denying Appellant's Rule 60(b) Motion for Relief from Order be affirmed, and that the appeal of Blain be dismissed.

DATED this 15th day of November, 1999.

MORGAN, MEYER & RICE, L.C.

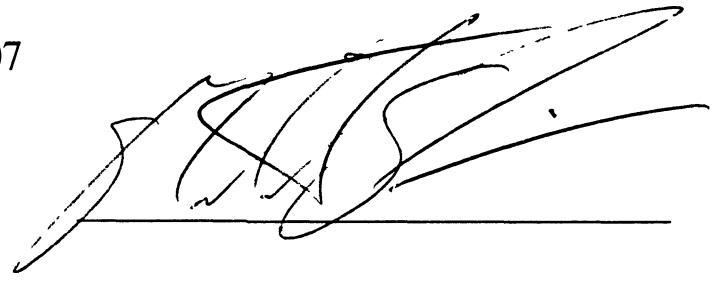


Mitchel T. Rice
Todd C. Hilbig
Attorneys for Defendant and Appellee
Wal-Mart Stores, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of November, 1999, I caused two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE** to be hand-delivered to the following:

G. Steven Sullivan
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107



CONTENTS OF THE ADDENDUM

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447 (Utah 1993); Putvin v. Thompson, 878 P.2d 1178 (Utah Ct. App. 1994); Ron Shepherd Ins. v. Shields, 882 P.2d 650 (Utah 1994); Commercial Inv. Corp. v. Siggard, 936 P.2d 1105 (Utah Ct. App. 1997); PDQ Lube Ctr., Inc. v. Huber, 329 Utah Adv. Rep. 20 (Utah Ct. App. 1997); PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah Ct. App. 1997).

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

C.J.S. — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

A.L.R. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 A.L.R.5th 699.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding

was entered or taken. A motion under this Subdivision (b) does not affect finality of a judgment or suspend its operation This rule does not limit power of a court to entertain an independent action to relieve a party fr judgment, order or proceeding or to set aside a judgment for fraud upon court The procedure for obtaining any relief from a judgment shall b motion as prescribed in these rules or by an independent action (Amended effective April 1, 1998)

Advisory Committee Note. — The 1998 amendment eliminates as grounds for a motion the following "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action " This basis for a motion is not found in the federal rule The committee concluded the clause was ambiguous and possibly in conflict with rules permitting service by a other than personal service

Amendment Notes. — The 1998 a ment deleted the former fourth ground motion in Subdivision (b) as described i Advisory Committee Note above, and re bered the grounds accordingly

Compiler's Notes. — This rule is simi Rule 60 F R C P

NOTES TO DECISIONS

"Any other reason justifying relief"
—Default judgment
—Impossibility of compliance with order
—Incompetent counsel
—Lack of due process
—Merits of case
—Mistake or inadvertence
—Mutual mistake
—Real party in interest
—Refund of fine after dismissal
Appeals
Clerical mistakes
—Computation of damages
—Correction after appeal
—Date of judgment
——Void judgment
—Estate record
—Inherent power of courts
—Intent of court and parties
—Judicial error distinguished
—Order prepared by counsel
—Predating of new trial motion
Court's discretion
Default judgment
Effect of set-aside judgment
—Admissions
Form of motion
Fraud
—Burden of proof
—Divorce action
Independent action
—Constitutionality of taxes
—Divorce decree
—Fraud or duress
—Motion distinguished
Invalid summons
—Amendment without notice
Inequity of prospective application
Jurisdiction
Mistake, inadvertence, surprise or excusable neglect
—Default judgment
——Illness
——Inconvenience
——Meritorious
——Merits of claim
——Negligence of attorney
——No claim for relief
—Delayed motion for new trial
—Factual error
—Failure to file cost bill
—Failure to file notice of appeal
—Nonreceipt of notice and findings
—Trial court s discretion
—Unemployment compensation appeal.
—Workmen's compensation appeal
Newly discovered evidence
—Burden of proof
—Discretion not abused
Procedure
—Notice to parties
Res judicata
Reversal of judgment
—Invalidation of sale
Satisfaction, release or discharge
—Accord and satisfaction
—Discharging representative of estate further demand
—Erroneously included damages
—Prospective application of judgment
Timeliness of motion
—Confused mental condition of party
—Dismissal for lack of prosecution
—Fraud
—Invalid service
—Judicial error
—Jurisdiction
—Mistake inadvertence and neglect
—Newly discovered evidence
—Order entered upon erroneous assumpt
—"Reasonable time "
—Reconsideration of previously denied m
—Satisfaction
Unauthorized appearance
Void judgment
—Basis
—Lack of jurisdiction
Cited

"Any other reason justifying relief."

Subdivision (b)(7) embodies three rec ments First, that the reason be one other those listed in Subdivisions (1) through second that the reason justify relief, and t that the motion be made within a reaso

Tab B

publication was obtained by fraud is a direct and not a collateral attack Bowen v. Olson, 122 Utah 66, 246 P.2d 602 (1952).

—Discretion of court.

A trial court is endowed with considerable latitude of discretion in granting or denying a motion to set a default judgment aside. Board of Educ v. Cox, 14 Utah 2d 385, 384 P.2d 806 (1963)

Where plaintiff sought relief from a default judgment pursuant to Rule 60(b) on three occasions before three different judges and his motions were denied in the first two proceedings, the third judge was barred by the law of the case from overruling the previous orders. Mascaro v. Davis, 741 P.2d 938 (Utah 1987).

—Grounds.

——Excusable neglect.

A default certificate may be set aside upon grounds of excusable neglect. Heathman v. Fabian & Clendenin, 14 Utah 2d 60, 377 P.2d 189 (1962).

While reliance on an attorney's assurances that one's rights are being protected could, in the appropriate circumstances, be seen as excusable neglect, trial court properly refused to excuse the neglect of a defendant who failed to establish that she was so represented. Miller v. Brocksmith, 825 P.2d 690 (Utah Ct. App. 1992).

—Judicial attitude.

Where any reasonable excuse is offered by defaulting party, courts generally tend to favor granting relief from a default judgment, unless to do so would result in substantial prejudice or injustice to the adverse party. Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, 544 P.2d 876 (Utah 1975).

—Movant's duty.

Party who seeks to have a default judgment set aside must proffer some defense of at least sufficient ostensible merit to justify a trial on that issue Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976).

—Setting aside proper.

Where plaintiff served defendant with a summons, and left a copy with the defendant which was not the same as the original, the court had jurisdiction but sufficient confusion was created so that a motion to set aside the default judgment should have been granted and the defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. Fibreboard Paper Prods. Corp. v. Dietrich, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977).

Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from the date of notice of entry of such judgment, rather than from the date of judgment. Buckner v. Main Realty & Ins. Co., 4 Utah 2d 124, 288 P.2d 786 (1955) (but see Central Bank & Trust Co. v. Jensen, supra, and Rule 58A(d).

Cited in Utah Sand & Gravel Prods. Corp. v. Tolbert, 16 Utah 2d 407, 402 P.2d 703 (1965); J.P.W. Enters., Inc. v. Naef, 604 P.2d 486 (Utah 1979); Katz v. Pierce, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham-Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: Graham v. Sawaya, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 46 Am. Jur. 2d Judgments § 265 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without

supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997.)

Tab C

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

DEE BLAIN, Plaintiff, vs. WAL-MART STORES, INC., Defendant.	**MEMORANDUM DECISION** CASE NO. 970400626 DATE: February 8, 1999 JUDGE: RAY M. HARDING DEPUTY CLERK: Georgia Snyder LAW CLERK: Dave Backman

This matter came before the Court upon Defendant's Motion for Summary Judgment. Having received and considered the Motion, together with memoranda in support of and opposition to the Motion, the Court hereby grants the Motion and delivers the following Memorandum Decision.

Statement of Facts

Plaintiff was injured when she slipped and fell on a liquid detergent spill as she was approaching the cashier stands at the Wal-mart in Orem. Melia Lei O'Hawaii White Freeman, a Wal-mart department manager, testified in her deposition that she had been cleaning the spill for a minute or two when she turned a corner in an effort to continue to clean the spill trail and found Plaintiff standing and talking to Troy Guevera, a Wal-mart assistant manager, after the injury. Plaintiff testified in her deposition that she remained on the floor for ten to fifteen minutes after the fall.

Opinion of the Court

Summary judgment is proper only if there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law " URCP 56(c). The Court must view the facts in the light most favorable to the non-moving party Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993).

In a slip and fall caused by a temporary hazard,

> it is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it. Schnuphase v Storehouse Markets, 918 P.2d 476 (Utah 1996).

The Court finds that there is no evidence that Defendant had knowledge of the liquid detergent spill until after Plaintiff's injury. There is also no evidence that the spill had existed for a long enough time that Defendant had constructive knowledge of it. Ms. Freeman testified in her deposition that she had been cleaning the spill for one to two minutes when she discovered Plaintiff standing and talking to assistant manager Guevera after the injury. Plaintiff testified in her deposition that she remained on the floor for ten to fifteen minutes after the fall. Since Plaintiff was standing when Ms. Freeman found her talking to Mr. Guevera, Defendant did not have knowledge of the spill until several minutes after the fall.

Plaintiff argues that it is disputed whether Defendant had knowledge of the spill before her fall since she testified in her deposition that she was still lying on the floor when she talked to Mr. Guevera and because Ms. Freeman's description in her deposition of the person she found standing and talking to Mr. Guevera was obviously of another woman. However, the Court cannot consider these arguments since Plaintiff did not provide the Court with a copy of the portions of the depositions which allegedly contain these statements.

> [W]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the

moving party is entitled to judgment. Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983).

Since Defendant's Motion and supporting portions of depositions do not affirmatively disclose the existence of a genuine issue of material fact, the Court has no supporting factual basis for it to consider Plaintiff's arguments.

Order

Accordingly, Defendant's Motion for Summary Judgment is hereby granted.

DATED this 9 day of February, 1999.

BY THE COURT:

RAY M. HARDING, JUDGE

cc: G. Steven Sullivan, Attorney for Plaintiff
Stephen G. Morgan, Attorney for Defendant
Mitchel T. Rice, Attorney for Defendant